Nos. 22230 and 22230A

In the

United States Court of Appeals

For the Ninth Circuit

PACIFIC COAST ENGINEERING COMPANY, a corporation,

Appellant,

vs.

MERRITT-CHAPMAN & SCOTT CORPORATION, a corporation,

Appellee.

Brief of Appellant

On Appeal from the United States District Court for the Northern District of California, Northern Division

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SUBJECT INDEX

TABLE OF AUTHORITIES

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I.

JURISDICTIONAL STATEMENT

This action was filed by appellant in the Superior Court in and for the County of Alameda, State of California. Appellee removed it to the United States District Court for the Northern District of California upon the grounds that appellant was a citizen of the State of California and had its principal office there; that appellee was a citizen of the State of Delaware and had its principal office in the State of New York; and that the amount in controversy exceeded $10,000.

All those things were true (C.Tr. 1-10), and the jurisdiction of the trial court was therefore sustained by 28 U.S.C.A. §§ 1332, 1441. That court has entered final judgment (C.Tr. 202-3), and jurisdiction of this court is therefore sustained by 28 U.S.C.A. §§ 1291, 1294.

II.

STATEMENT OF THE CASE

A. Introduction

This litigation arises out of the Priest Rapid's Project, which involved the construction of a dam on the Columbia River in the State of Washington.

Merritt-Chapman & Scott ("MCS"), the appellee, was the prime contractor on that project. In the Summer of 1957 it entered into a contract with Pacific Car and Foundry Co. ("Pacific") by which Pacific agreed to build and deliver dam gates to MCS. (R.Tr. 102) About the same time MCS entered into a contract with Pacific Coast Engineering Co. ("Paceco") by which Paceco, the appellant, agreed to build and deliver to MCS hoists to raise Pacific's gates. (Ex. 7; R.Tr. 107)

In the Fall and Winter of 1957 Paceco and Pacific reached agreement on the capacities which Paceco's hoists would have to have to raise Pacific's gates, and MCS told Paceco to start work. Paceco did.[1]

A few months later Harza Engineering Co. ("Harza"), the engineer to the public agency for which the project was being built, told MCS that the hoist capacities on the basis of which MCS had told Paceco to start work were wrong. Whether they were wrong turns on the meaning of a section of the specifications (Ex. 4, § 2-03, D, 3, set forth in Find-

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1. The facts set forth in this Introductory Statement for which no record references are given are discussed in detail, with record references, at pp. 4-12, below.

ing 7, C.Tr. 187), which provided that the gates Paceco's hoists were to raise were to have a "safety in motion" factor of 1.5.

Paceco and Pacific read that section to mean that the gates when closing had to have a force equal to 1.5 times *moving friction.* That means a force 1.5 times the forces resisting movement (including the surface resistance of the water) just after the gates begin "motion" and start to close. (See Finding 6, C.Tr. 187; R.Tr. 572-3)

Harza read that section to mean that the gates when closing had to have a weight equal to 1.5 times *static friction.* That means a force 1.5 times the forces resisting movement just *before* the gates begin "motion" and start to close. (See Finding 6, C.Tr. 187; R.Tr. 576, 675, 705-8)

The specifications require heavier gates on Harza's reading of them than on Pacific's and Paceco's. (R.Tr. 143-45, 153, 514) The heavier the gates, the heavier the hoists required to raise them. (R.Tr. 540)

Paceco believed that its reading was right, and it told MCS so. It also told MCS that costs would be greater if hoists had to be built with the capacities Harza read the gate specifications to require. It said it was extremely anxious to cooperate with MCS "in any way" to settle the matter. Instead of doing that, MCS cancelled Paceco's contract and got a new contractor to build the hoists.

Paceco filed a complaint which alleged that that cancellation was wrongful, and asked for damages for expenses and lost profits. [C.Tr. 7-9 (State Court complaint);[2] C.Tr. 57 (amendment to complaint)] MCS counterclaimed for $46,823.00 (C.Tr. 18-21), which, it said, was the difference

2. Paceco also filed a second complaint in the District Court respecting a different matter (C.Tr. 216), on the first cause of action of which it recovered judgment. (C.Tr. 203) It is not involved in this appeal.

between the price at which Paceco had agreed to build the hoists and the price MCS paid the third party whom it engaged to build them.

The trial court, the Honorable Oliver Carter presiding, held that MCS was entitled to cancel Paceco's contract because the specifications meant what Harza said they meant, and because Paceco, so it found, had refused to build the hoists required by the specifications without being paid extra for doing so. (Findings of Fact and Conclusions of Law, C.Tr. 185-197)

Accordingly, the trial court entered judgment against Paceco on its complaint, and awarded judgment for MCS on its counterclaim (C.Tr. 202-3) This appeal followed.

There are two questions presented.

The first is whether the court's findings and conclusions that Harza's reading of the specifications was right is itself wrong as a matter of law. If the answer to that is yes, the second question need not be answered and the judgment against Paceco on its complaint and the $46,823.00 judgment for MCS on its counterclaim must be reversed.

The second question is whether the court's findings and conclusions that Paceco refused to perform its contract, and that that refusal constituted a material breach justifying MCS' cancellation of the contract (Findings 23-24, C.Tr. 192; Conclusions 1-3, C.Tr. 196), are wrong as a matter of law. If the answer to that is yes, the judgment for MCS on its counterclaim must be reversed.

B. The facts

The facts, nearly all of which come from documents and none of which is disputed, are these:[3]

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3. "The rule that findings of fact are entitled to great weight in an appellate court is modified" where those findings are based on documents. *The Natal,* 14 F.2d 382, 384 (9th Cir. 1926); 273

1. MCS and Pacific provided hoist capacity calculations to Paceco for Paceco's use in performing its contract up until Harza disapproved the calculations (August 1957-February 1958).

In August, 1957, before Pacific's and Paceco's agreements with MCS were signed, Pacific sent Paceco some "appropriate" hoist capacities for "use in designing the hoists. . . ." (Ex. 5) Paceco asked Pacific for more information because it could not understand why Pacific's hoist capacities were so large "when compared to the gate weight." (Ex. V) Pacific obliged by sending Paceco some calculations prepared by a consulting engineering firm. (Exs. 6, W; R.Tr. 107-8, 414-15)

In October, after Pacific's and Paceco's agreements with MCS had been signed, Paceco told MCS it was still "having difficulty sizing the hoists" with the information Pacific had provided it, and asked MCS to "advise us as to the hoist capacities required. . . ." (Ex. 9, pp. 1-2, R.Tr. 113) MCS did not answer right away, so Paceco wrote MCS again, and said that without the information it had asked for it could not schedule work "required under the contract." (Ex. 10) MCS replied that it was to consult with Pacific "next week" and that it hoped to forward "all information and data" then. (Ex. 11)

A few days later it sent Paceco Pacific's calculations respecting hoist loads. It also told Paceco to start work on all but two items, since on all but those two Pacific's calculations agreed with Paceco's. (Exs. 12, 12A-B)

U.S. 748, *cert. den.*, 273 U.S. 748 (1926) (findings based on written depositions). In those circumstances, the appellate court "is equally capable of examining the evidence and drawing conclusions from it, and is under the duty of doing so." *United States v. Corporation of The President,* 101 F.2d 156, 160 (10th Cir. 1939) (findings based on "stipulations, records and written statements"); *General Casualty Co. of America v. Azteca Films, Inc.,* 278 F.2d 161, 168 (9th Cir. 1960), *cert. den.,* 364 U.S. 863 (1960); *Bowles v. Carnegie-Illinois Steel Corp.,* 149 F.2d 545, 546 (7th Cir. 1945).

That was the end of October, 1957. During the next few months Paceco did a good deal of engineering and design work on the basis of the hoist load calculations as to which it and Pacific had agreed, because MCS had told it to. (Exs. 12, AA; R.Tr. 117-19, 133-40)

Things moved along. Pacific made some changes with respect to the two items as to which agreement had not been reached in October. In early December, MCS told Paceco what those changes were. (Ex. AK) At the end of the month Paceco sent MCS calculations it had "revised to agree with the changes made by Pacific" and which respected those two unagreed upon items. (Ex. AC; R.Tr. 450-51, 499) MCS advised that Pacific concurred with those revised calculations in mid January, and asked Paceco to send six copies of its calculations for its file and to "submit" to Harza. (Ex. 15)

Paceco sent them on February 4. (Ex. 16) By then it had completed 75 to 80 per cent of its design work on the hoists (R.Tr. 140)

There was dispute at the trial as to whether Pacific and MCS were responsible under the contract for preparing the calculations, or whether Paceco was. Paceco took the position that Pacific and MCS were, and that they had to be, for the very good reason that one cannot design hoists without knowing what they are to hoist, and Pacific, not Paceco, was making the gates which were to be hoisted. (See, e.g., R.Tr. 145, 328; Ex. AJ, pp. 2-3)[4]

The trial court found that that was not right, and that Paceco was responsible for the calculations (Finding 15,

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4. Mr. Martin, defendant's witness, also testified that various items which determine hoist capacities, such as gate weight (R.Tr. 974-5) and size of seals (R.Tr. 977), are functions of gate design. See also R.Tr. 998-1000.

C.Tr. 189). But the merit, or lack of it, in that finding is not important for purposes of this argument. What matters is that up through February 4, 1958, when Paceco sent its hoist capacity calculations to MCS for its file and to submit to Harza, Paceco had consistently told MCS that it could not perform without having Pacific's and MCS' calculations; MCS had consistently supplied Paceco with calculations upon request; and everyone's actions showed that everyone thought that, whoever had ultimate responsibility for the calculations, Paceco could not perform its contract without at least having MCS's gate manufacturer's calculations to work upon.[5] Indeed, MCS required Paceco by that contract (Ex. 7, pp. 3-4; R.Tr. 322) to exchange information relating to design with Pacific, and felt compelled to demonstrate to Harza that "hoist design ha[d] been coordinated with . . . [Pacific] as gate designer . . . ." (Ex. AV; R.Tr. 1001)

The parties continued to act in that same way right through September, when MCS cancelled the contract. (See pp. 8-11 below)

2. Harza's disapproval of the calculations (February 20-24, 1958).

At the end of February MCS advised Paceco that Harza, the project engineer, had disapproved the hoist capacity calculations for which Pacific had, through MCS, furnished information, and on the basis of which MCS had told Paceco to go to work back in October. All the calculations which had been sent back and forth between those parties had applied the 1.5 factor of safety in motion to moving frictions, but Harza said that those calculations were inadequate because "the motion factor of safety . . . must be based

5. The trial court also understood the "practice" to be that information was provided by Pacific and "recalculated" or "rechecked" by Paceco. (R.Tr. 909-10)

on the starting [i.e., static, see p. 3, above] friction factors." (R.Tr. 635-36; Ex. AD)[6] That was the first time that anyone, including Harza, had taken the position that the phrase "factor of safety *in motion*" in the specifications meant static rather than moving frictions. (R.Tr 992, 1010; Ex. 45, Part C-10)

3. MCS continued to provide Paceco with hoist capacity calculations after Harza's disapproval through August, 1958; Paceco continued to work on them.

After Harza had rejected the hoist calculations, Paceco told MCS, just as it had with respect to the first set of calculations, that "to redesign our hoist . . . it will be necessary that new hoist capacities be furnished to us by Pacific Car and Foundry." (Ex. AE) MCS responded, just as it had with respect to the first set of calculations, by sending Pacific's calculations to Paceco, along with some of its own. (Exs. AF, AH)

Paceco used those calculations, just as it had used the first set of calculations with which MCS had provided it, to design the hoists. On June 4, 1958 it advised MCS that "we are proceeding as rapidly as possible with design of the hoists, on which you have furnished complete information, and will complete the design of all hoists upon receipt of final hoist capacity information from you." (Ex. AJ)

MCS and Harza worked on those calculations, which filled a book (Ex. 45), from time to time during the Spring and Summer. (R.Tr. 147, 1030; Ex. AH) They revised them now and again (Ex. AH; R.Tr. 147, 342), and asked Paceco from time to time to check them, which it did. (R.Tr. 142, 146-47; Ex. AG)

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6. Harza's letter made comments on other errors in the calculations of the kind "normally expected" and about which there was "no argument." (R.Tr. 639-40; Ex. AD)

Paceco did not get the last hoist capacity information with which MCS provided it until the end of August, 1958. (Ex. I, p. 1) As it turned out, that was not the "final hoist capacity information," which MCS never furnished to Paceco. (See p. 12, below)

4. Through August 1958, while MCS provided Paceco with new hoist capacity calculations, and while Paceco worked on them, Paceco asked to settle the matter of the extra costs those new calculations required.

Paceco took the position that the revisions Harza required were not its fault because it had "no control in establishing the criteria effecting (sic) gate hoist capacities," and because the revisions were caused by what it considered to be poor design of the gates and by a misreading of the provision in the specifications requiring the gates to have a "safety in motion" factor of 1.5. (Ex. B)

Accordingly, while Paceco asked for and received hoist capacity calculations from MCS, and went to work on those calculations, it talked about the extra costs which those revisions entailed. In March, when Paceco first asked MCS for new hoist calculation information, it told MCS that it "will submit our prices for additional engineering. . . ." (Ex. AE) In April, after MCS had sent its "preliminary" new hoist capacity calculation, Paceco told MCS that the "revisions" will "result in increased cost on the various units." (Ex. B)

Paceco did not refuse to perform unless it were paid more money for those extra costs. It just asked MCS to sit down and talk about it while Paceco proceeded "as rapidly as possible with the design of the hoists" and awaited receiving MCS' "final hoist capacity information to complete the design." (Ex. AJ, p. 4) "In the meantime," it said:

> *"We are extremely anxious to cooperate with you in any way we can to bring the matter of additional costs to a mutually satisfactory conclusion.* In matters of this

nature we believe that letters are a very cold means of communication and therefore request that a meeting be arranged in your office at your convenience to discuss and settle the problem." (Ex. AJ, p. 4) (Emphasis added)

5. Paceco continued to request and work upon hoist capacity calculations in September, 1958. It continued to propose payment to it of its extra costs. It did not refuse to perform.

Paceco worked on designing the larger hoists right through September, 1958. (pp. 7-8, above; R.Tr. 200) It received a set of calculations from MCS at the end of August. (See p. 8, above) It worked on them for about a week. Then, on September 8, it sent them back to MCS with six pages of "supplementary calculations", and an engineering report. (Ex. I)

In the covering letter Paceco pointed out that it was unable to continue engineering work on the contract or purchase materials for fabrication until the "hoist capacities are firmly established and the extra costs incurred by . . . [it] are agreed upon." (Ex. I) Of course that was true; the first stage in the manufacturing of hoists is to establish their capacities, and one does not purchase materials for fabrication until those capacities are established. (R.Tr. 542-44)

It still did not refuse to perform unless it were paid more money. It said "if there is anything we can do to assist your office in settling those capacities with Harza . . . and Pacific . . .," we will do it. (Ex. I, pp. 1-2) It said that the reason it had worked on the calculations MCS had provided it was to help MCS "equitably arrive at a proper hoist capacities (sic) in conjunction with Harza . . . and so instruct . . . [Paceco] as to which hoist capacities shall be furnished on all items. . . ." (Ex. I, enclosure, p. 3) It concluded by ask-

ing "to hear from you very soon regarding the final hoist capacities established as we are unable to proceed . . ." until they are established. (Ex. I, p. 2)

A few days later, on September 12, MCS' Mr. Powell met with Paceco. Mr. Powell asked "that [Paceco] offer some mutually satisfactory arrangement wherein manufacture of the [new] hoist capacities could be started immediately." (Ex. 19, pp. 1-2; see also R.Tr. 158, 160, 342-3, 345) On September 26 Paceco advised MCS that it was "pleased to quote" $85,285.00 "for the additional work," that is, $85,285.00 more than the contract price without that work. (Ex. 19)

But still again it did not refuse to perform unless paid more money. In the first place the "quote" included the cost of supplying D.C. Motors with the hoists, which was itself an extra. (R.Tr. 201; Ex. 14) Moreover, in the same letter in which that "quote" was made, Paceco proposed a "working arrangement," which included payment to it of $59,285.00 to deliver the new hoists "predicated," among other things, upon Paceco's helping MCS obtain an $11,000 extra for the requirement that the safety factor on the hoists was to be 1½ times static, not moving, friction. (Ex. 19, p. 2) If that additional safety factor were not required, the proposed working arrangement provided that Paceco was to be compensated "for any additional engineering design costs" only. (Ex. 19, p. 2)

6. On September 24 MCS cancelled the contract.

MCS did not so much as consider that September 26 proposal for which its Mr. Powell had asked, and never answered it, because two days before it was sent MCS cut Paceco off flat at the pockets by a note "cancelling" the

whole hoist contract. (Ex. 18) Paceco's proposal had been sent before Paceco had seen that note. (R.Tr. 157-58)

MCS' act, without warning, seems to Paceco to have been uncalled for in any case. But that is not the end of the story. At the very time Paceco was working on the proposal for which Mr. Powell had asked and which respected capacities of 1.5 times static friction, MCS, unknown to Paceco, had asked Harza to reduce those capacities from 1.5 to 1.25. (R.Tr. 992-94) Harza had done so a few days before the cancellation. (Ex. 42) MCS never so much as told Paceco about that. (R.Tr. 162-63) But at the same time it cancelled Paceco, it secretly offered another subcontractor the opportunity to bid on the reduced capacity hoists. (Ex. 43)

III.

SPECIFICATION OF ERRORS

1. The Court found that:

> "The true interpretation of Section 2-03,D,3 of Specification 138-100 requires that the gates, plus any ballast, have a dead weight equal to or greater than 1½ times the sum of the resisting forces (wheel friction, rolling friction and seal friction) under static, rather than under running, conditions."[7] Finding No. 10, C.Tr. 188.

The finding is clearly erroneous as a matter of contract interpretation since contrary to the plain meaning of the language used and contrary to the interpretation of all who dealt with the contract or testified at the trial, with the possible exception of the man who wrote the language.

2. The Court found that:

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7. Of course if finding 10 falls, all related findings, such as 17 and 22, fall with it.

"Paceco knew when it made the calculations on which it based its bid: that Section 2-03,D,3, was intended to insure closure of the gates; that the weight of the gates had to exceed 1 times static friction in order that the gates would move at all; that a basic and generally applicable engineering principle is that 'normal loading' or 'design loading' conditions have reference to the most adverse conditions to which the equipment will normally be subjected; that whenever the gates move they must overcome static resisting forces; that static resisting forces, not running resisting forces, are the conditions with respect to which the gates and hoists were to be designed; that 1½ times running resisting forces is in the present case less than 1 times static resisting forces; that if the factor of safety required by Section 2-03,D,3, is interpreted as having reference to running resisting forces, the sole object of the Section, namely, to insure closure of the gates, would be wholly defeated; Paceco knew or should have known and at all material times that the factor of safety of 1½ required by Section 2-03,D,3 has reference to static resisting forces. Nevertheless, Paceco proposed to supply hoists designed for gate weights equal to 1½ times running resisting forces only. It made other material errors and omissions in its gate weight calculations. In this connection, the Court finds the testimony of Witness Martin to be true and correct." Finding No. 17, C.Tr. 190.

That finding is clearly erroneous, illogical and self-contradictory. The court has attempted to find that 100% is equal to 150% and that plaintiff should have known it. The court's finding states in effect that since (1) to insure closure the weight of the gates had to exceed one times static friction, and since (2) 1½ times running friction is less than one times static friction,[8] therefore, closure must

8. A proposition we contest but concede for the purposes of this argument.

be insured by 1½ times static friction. Accordingly, plaintiff knew or should have known that the contract references to "motion" in Section 2-03,D,3 not only meant "static", but 1.5 times static. QED?

3. The court erred in refusing to make plaintiff's proposed findings A., B., and C. (C.Tr. 181)

> "A. Paceco was at all times prepared to supply hoists designed to pull in excess of 1½ times running or moving resisting forces and in excess of one times static resisting forces but not 1½ times static resisting forces.
>
> B. Neither Merritt-Chapman's engineers nor those of Pacific Car calculated hoist capacity at 1½ times static resisting forces. This interpretation of the specifications was first made by Harza after receipt by Harza of calculations prepared and checked by Paceco, Merritt-Chapman and Pacific Car and submitted to Merritt-Chapman.
>
> C. Harza's own calculations prior to issuance of the specifications did not use 1½ times static forces and in some instances arrived at smaller hoist capacities than calculated by Paceco (Exs. 45 & 46)."

These findings are supported by the entire record and there is no evidence to the contrary. Finding "A." alone requires reversal.

4. The Court found that:

> "After being advised of Harza's refusal to approve Paceco's calculations and its reasons, Paceco sought to defend its calculations and finally advised Merritt-Chapman that it would not deliver any hoists of a rated capacity greater than the ones contemplated by its calculations, except upon payment of additional sums amounting to $85,285.00 for hoists of the capacity which Harza said would be required. (Finding No. 23, C.Tr. 192)

> "Paceco's refusal constituted a material breach of its contract. At the time of Paceco's refusal it had expended approximately $11,000.00 (on a $229,440.00 contract) in costs for design and hoist calculation work, none of which was of any value to Merritt-Chapman." (Finding No. 24 C.Tr. 192)

On the basis of those findings the court concluded that "Paceco materially and totally breached its contract" and that, accordingly, MCS "rightfully terminated" that contract. (Conclusions 1-3, C.Tr. 194)

Those findings and conclusions are wrong as a matter of law because there is insufficient—in fact no—evidence to support them and because they violate the settled rule that a promisor's statement with respect to intention to perform does not constitute a material, or "anticipatory," breach unless that statement is a "distinct, absolute, and unequivocal" renunciation of the promise and unless the statement is relied on as such by the promisee.

IV.

ARGUMENT

Summary of argument

The specifications said that the gates were to have a safety *in motion* factor of 1.5, and that is what they meant. (Part A, below)

Paceco did not commit an anticipatory breach. It never refused to perform its contract, much less absolutely and unequivocally (Part B, B(1), B(2), below), and nothing it said or did was relied on as any thing of the kind by MCS. (Part B(3), below) MCS' cancellation of Paceco's contract was inexcusable, particularly in the light of the reasons for the anticipatory breach rules. (Part B(4), below)

A. The specifications required a safety in motion factor of 1.5., and meant it.

Section 2-03 D of the specifications prepared by Harza Engineering Company and upon the basis of which Paceco submitted its bid to MCS, provides:

> "3. *Gate Motion Factor of Safety.* All gates shall have a minimum factor of safety in motion of 1.50 under normal loading conditions. This motion factor of safety shall be defined as equal to the ratio of the dead weight of the gate plus any ballast required divided by the sum of the resisting forces, (wheel friction, rolling friction, and seal friction.)" (Ex. 4; Finding 7, C.Tr., 187).

As the court found (Finding 7) and as counsel for MCS conceded in his opening statement (R.Tr. 73, line 24), this is the principal relevant portion of the contract.

1. The specifications provided for a safety factor based on moving frictions, and everyone so understood them.

Beginning in August of 1957, the gate manufacturer, Pacific, provided its calculations of the gate weights and resultant hoist pulls required by these specifications. (Ex. 5) These were checked by Paceco (Ex. 9), reworked by Pacific Car (Ex. 12-B), revised by Paceco to agree with Pacific's changes (Ex. AC), rechecked by Pacific (Ex. 15), reviewed by MCS (Exs. 12, AK, AV), and ultimately submitted to the District Engineer, Harza. In every instance these parties when checking for safety factors applied the "1.5 factor of safety in motion" to the moving frictions, because that is what the specifications said three times—"motion factor of safety" . . . "minimum factor of safety in motion" . . . " This motion factor of safety".

On February 21, 1958, Harza for the first time presented to the contracting parties its insistence that the 1.5 gate

motion safety factor be applied to static and not "in motion" conditions. (R.Tr. 143, 636-7; Ex. AD) That interpretation was unique then, and it still is. In fact, in the calculations made in the office of Harza prior to the letting of bids, the factor of safety was not applied to static conditions (R.Tr. 1010-11), and in many instances Harza at that time reached hoist capacities lower than reached by the contracting parties out here. (Ex. 45, Part C-10, R.Tr. 1010-1013) The independent expert, Dr. Franzini, Professor of Civil Engineering at Stanford, interpreted the specifications as requiring a safety factor applied to moving friction. (R.Tr. 1094, 1106) Furthermore, if the specifications could reasonably have been read to require the larger hoist resulting from a 50% excess safety factor over static friction the original bids would have been in line with the final price paid Berger Engineering, the contractor to whom MCS ultimately awarded the job, particularly since the latter constructed hoists having only a 25% excess safety factor by special agreement. (R.Tr. 992-94, Exs. 42-43)

The only one who may have read the specifications in accordance with the trial contentions of MCS[9] was the individual engineer, Martin of Harza, the very man who wrote the specifications and in midstream decided that he should have required a greater or different safety factor. He may have meant to require a starting or static safety factor in some amount. *He did not do so, however.* See *Gardner v. City of Englewood,* 131 Colo. 210, 282 P.2d 1084, 1090 (1955):

> ". . . Intent is to be determined from the contract itself, if possible to do so, and parties are bound by what the

9. MCS did not call as a witness the man who prepared its own calculations, George Gothro. Presumably, therefore, his testimony would have been adverse to its trial contention. After objection, defendant withdrew a question to Mr. Martin as to what the specifications meant. (R.Tr. 963-65)

> contract says rather than what they say. Also, one bidding for a construction job has a right to rely upon the plans and specifications furnished him by the representative of the owner, and respective obligations of the parties are to be measured in accordance with that particular set of plans and specifications upon which a contractor submitted his bid." (Citations omitted)

See also *Wunderlich Contracting Co. v. U. S.*, 240 F.2d 201 (10th Cir. 1957), *cert. den.* 353 U.S. 950 (1957):

> "A contractor who bids for work has the right to rely on the plans and specifications submitted to him for bidding purposes. The rights of the parties are to be measured by them. It is only through the plans and specifications that he can make an intelligent bid. Burdens other than those contemplated by the contract, may not be placed upon the contractor without additional compensation." (Citations omitted)

2. The specifications cannot be read to require a static safety factor of 1.5, even if they could be read to require a static safety factor greater than 1.

MCS contended in the trial that since gates must go down by themselves from a stopped position, Paceco should have assumed or read in by implication a static safety factor. Perhaps so, but on what basis was Paceco to assume or imply that the static factor was 1.5 as Harza argued during the spring and summer of 1958, or 1.25 as they eventually secretly gave to Berger Engineering to whom the contract was awarded at or before the time Paceco was fired (see pp. 12, 17, above), or some other number?

All that can be implied, if anything, is that the weight must be greater than one times the static resisting forces, and Paceco never contested this. But it was not given the opportunity even to discuss this point with Harza (R.Tr. 342, 344), which continued to insist that the specification required 1.5 times static.

One takes specifications as one finds them and one does not know what the engineer who writes them has in mind. (R.Tr. 1186, 1191) Bidders, like Paceco, were entitled to assume that the engineer preparing the specifications had determined that 1½ times his motion factors would exceed one times his static factors and insure closure, because this is all he said in the provision of the specifications intended to insure closure (Finding 7; see pp. 16, 18, above). Harza's engineer almost did that job. Professor Franzini demonstrated at the trial that although gate weights determined on the basis of motion friction in accordance with the specifications would not quite make it, they would need to be only 41 pounds heavier, in order to exceed one times the static resisting forces. (R.Tr. 1104-1105)

Therefore if Paceco had any duty to go about implying terms into the specifications, perhaps it should have implied that the gates should have been 41 pounds heavier. But that's all. Use of a 50% overload on static factors as Harza desired by afterthought increases the gate weight and resultant hoist capacity by nearly 5,000 pounds. (R.Tr. 1102, 1103) It is foolish to make gates that heavy, and no one ought to be required to imply a foolish term into a contract. (Calif. Civ. Code § 1643)

As a matter of fact, after the gates were actually installed, a test was made on certain of them and a back-pull of 16,500 pounds was detected on the chains during lowering. This was the result of Martin's factor of safety, as he conceded (R.Tr. 1116-1117), and is obviously far in excess of any conceivable gravitational force needed for closure, and, most important, far in excess of anything any hoist builder could be expected to read into the specifications by implication.

It is instructive to refer to some of the results reached in the many sets of calculations in evidence on one of the gates, namely, Item 1, RFDS, as an example of the different

amounts of ballast and hoist pulls reached during the many months that MCS and Harza attempted (unsuccessfully) to fit the larger hoist capacities within the requirements of the original specifications. It is interesting to note that the lowest capacity was reached by MCS itself on April 11, 1958, namely, 6,672 pounds (Ex. 45, § C2—3d and 33rd sheets from end). Harza's pre-bid calculations were 8,870 pounds (Ex. 45, § C-1, fourth sheet). Pacific Car, MCS and Paceco had reached capacities of around 8,000 pounds in the fall of 1957 and Paceco was thereupon ordered to and agreed to build a 10,000 pound hoist on that RFDS gate. (R.Tr. 726, line 21) On April 21, 1958, Harza calculated 10,520 pounds of ballast into this gate resulting in a hoist capacity of 19,215 pounds (Ex. 45, § C2, 73d and 74th sheets from end). When the contract was given to Berger Engineering after plaintiff was cancelled, Berger was given a rated hoist capacity of 16,615 pounds. (Ex. BH) Numerous additional and different results were reached by the witness Martin from Harza Engineering[10] during the trial.

How can one say that Paceco had the duty somehow to divine which one of that lot of calculations was the magic one?

B. Paceco never refused to perform, much less absolutely and unequivocally.

The court found and concluded that Paceco breached its contract by refusing to perform it in accordance with Harza's reading of the specifications. That is wrong to start

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10. Mr. Martin, attempting to justify the Harza work, specifications and drawings that were his responsibility, was the only witness called by defendant that was involved in the design or construction of the dam. Mr. Martin's attempts to blame Harza's errors and omissions on his subordinates does not help defendant's case. (R.Tr. 1025, lines 4-11, R.Tr. 1030, lines 6-20) Nor is defendant helped by its failure to call its own Project Engineer who participated in the original calculations which Martin (and now MCS) seek to criticize.

with because Harza's reading of the specifications was wrong. (Part A, above) It is also wrong even if Harza's reading was right, because Paceco did not refuse performance.

A statement by one party to another concerning his willingness, or lack of it, to perform a contract must be "a distinct and unequivocably absolute refusal to perform" to justify the other's cancelling the contract. Such a refusal is called an anticipatory breach. *Hanson v. Slaven,* 98 Cal. 377, 383 (1893). *Accord, e.g., Hertz Driv-Ur-Self v. Schenley Distil.,* 119 C.A.2d 754, 760 (1953); *California C. P. Growers v. Harris,* 91 Cal.App. 654, 656 (1928); *Johnson v. Meyer,* 209 C.A.2d 736, 742 (1962); *Campos v. Olson,* 241 F.2d 661, 663 (9th Cir. 1957):

> "The statement is insufficient to constitute an anticipatory breach because it is not an unequivocal and absolute repudiation of the contract."

Dingley v. Oler, 117 U.S. 490 (1886),[11] "shows how definite and positive an anticipatory breach must be. . . ." 4 CORBIN, *Contracts,* p. 906. There plaintiff delivered ice to defendant in year one in consideration of defendant's promise to deliver a like amount of ice to plaintiff in year two. In year one ice was selling for 50 cents a ton. In year two it was selling for $5.00 a ton. Defendant told plaintiff, in year two, that "we must, therefore, decline to ship the ice for you this season, and claim as our right to pay you for the ice, in

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11. *Dingley v. Oler* is a leading case. See, e.g., citing it, *McCloskey v. Minweld Steel Co.,* 220 F.2d 101, 105 (3d Cir. 1955). *Dingley* relied upon a passage from *Benjamin on Sales* and upon *Smoot's Case,* 15 Wall. 36 (1872). *Hanson v. Slaven,* 98 Cal. 377 (1893), perhaps the leading California case on anticipatory breach, relied upon the same two authorities. *Rauer's Law & Collection Co. v. Harrell,* 32 Cal.App. 45 (1916) also relied upon the same two authorities, and cited *Dingley* with approval.

cash, at the price you offered it to other parties here [50 cents], or give you ice when the market reaches that point." 117 U.S. at 494.

The court reversed the trial court's finding that that communication constituted an anticipatory breach, and held, as a matter of law, that it was not sufficiently clear and unequivocal to amount to one. The reason was that defendant's statement "decline to ship" had appended to it a statement of defendant's willingness to perform, although *on defendants own terms*—that is, if the price some day reached 50 cents again. *Id.,* at 501-2.

Campos v. Olson, 241 F.2d 661 (9th Cir. 1957) and *Atkinson v. District Bond Co.,* 5 C.A.2d 738 (1935) are other examples as to how definite and unequivocal a repudiation must be to amount to an anticipatory breach. In *Campos,* defendant boxer told plaintiff, his manager, that "I was leaving." 241 F.2d at 662. In *Atkinson* defendant told plaintiff that their contract " 'is made void and rescinded' on account of erroneous information furnished concerning the job." 5 C.A.2d at 741. Both statements were held not to amount to a breach, and in *Campos* this court, quoting from *Atkinson,* said:

> "A mere declaration, however, of a party of an intention not to be bound will not of itself amount to a breach, so as to create an effectual renunciation of the contract; for one party cannot by any act or declaration destroy the binding force and efficacy of the contract. To justify the adverse party in treating the renunciation as a breach, the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute." *Id.,* at 662-63

Paceco never made a statement near so definite or unequivocal as those made in *Dingley, Campos* or *Atkinson.* It

never told MCS that it "declined" to perform, or "was leaving," or that the contract was "void." In June it said "we are extremely anxious to cooperate with you in any way we can to bring the matter of additional costs to a mutually satisfactory conclusion." (Ex. AJ, p. 4) It said nothing more until September. Then it wrote a letter, which said it was unable to continue engineering work "until the hoist capacities are firmly established [which they had not been, see pp. 10, 12, above] and the extra costs incurred by . . . [it] are agreed upon." (Ex. I) Next MCS asked it to submit a proposal, and it did. It "proposed" a "working arrangement" according to which it was to be paid an extra $59,285.00 for the new hoists (or nothing except costs of the extra work to which it had been put if the new hoist capacities turned out not to be required). (See Ex. 19, and pp. 10-11, above)

Since Paceco's statements were far weaker than those in *Dingley, Campos* and *Atkinson,* the case is proportionately stronger for Paceco than for the successful defendants in those cases. Paceco's case is stronger for other reasons, as well:

1. Looked at in the worst light from Paceco's point of view, Paceco's statements were merely offers to perform according to its view of the contract.

In *Dingley* defendant appended an offer to the statement "we decline" to perform. The offer was to perform on defendant's terms only. The court held that that appended offer proved that there had been no anticipatory breach as a matter of law.

Paceco at the very least offered to perform on its terms, which were in accord with its interpretation of the contract. (Ex. 19) Its offer was not merely an appendage to a statement refusing performance, because it never made any such statement. Its offer was in fact the most aggressive thing it did, and it was the very basis for the court's finding that

it had committed an anticipatory breach. (See pp. 26-27, below) In *Dingley* the same kind of offer was held as a matter of law to require reversal of a finding of anticipatory breach based upon the outright statement of refusal to which it was appended!

The two conclusions are poles apart, and this one cannot stand. An offer to perform in accordance with the promisor's interpretation of the contract is not an anticipatory breach, even if that interpretation be erroneous. If it were otherwise, a party to a contract whose construction is disputed would "act at his peril," and "it would amount to a virtual denial of the right to insist upon an honest, but erroneous, interpretation." *Kimel v. Missouri State Life Ins. Co.,* 71 F.2d 921, 925 (10th Cir. 1934); *Mobley v. New York Life Ins. Co.,* 295 U.S. 632 (1935); *Wheeler v. New Brunswick, & C., R.R. Co.,* 115 U.S. 29, 35-7 (1885); *Walker v. Shasta Minerals & Chemical Company,* 352 F.2d 634, 638 (10th Cir. 1965):

> "[A]n offer to perform made in accordance with the promisor's interpretation of the contract, if made in good faith although it may be erroneous, is not such a clear refusal to perform as to constitute an anticipatory breach."[12]

2. Paceco's statements included offers to perform on other than its own terms, and were negotiable.

The defendant in *Dingley* made an offer to perform on its own terms, and left it at that. Paceco made the same offer, but it did not leave it at that. It said it was willing to do "anything" to help MCS settle the hoist capacities. (Ex. I)

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12. Furthermore, because the consequences which follow from an anticipatory breach are as severe as those which follow from actual breach, one would be afraid to exercise that right "to insist upon an honest but erroneous interpretation" if he could not be assured that his "expressions, sought to be converted into a renunciation of the contract, shall not be enlarged beyond their strict meaning." *Dingley v. Oler,* above, 117 U.S. at 502.

It said "we are extremely anxious to cooperate with you in any way we can to bring the matter of additional costs to a mutually satisfactory conclusion," it asked to talk about it (Ex. AJ, p. 4), it did talk about it, and, in its last September letter, which crossed with MCS' note cancelling the contract, it "proposed" a "working arrangement," which gave Paceco less than its own terms. (Ex. 19; see pp. 9-12, above)

And it did more than talk. It kept working "as rapidly as possible with the design of the hoists," (Ex. AJ, p. 4), continued to check the calculations with which MCS supplied it (pp. 8-10, above), and with the first of its two September letters furnished MCS with six pages of calculations to help MCS "equitably arrive at a proper hoist capacities (sic) . . .". (Ex. I, p. 1, and enclosure, p. 3)

An offer to cooperate "in any way," an invitation to talk, and a "proposed working arrangement" are by their terms negotiable, and a negotiable offer by definition is not "absolute" or "unequivocal" enough to constitute an anticipatory breach. See *Walker v. Shasta Minerals & Chemical Company,* above, 352 F.2d at 638:

> "[T]he letter . . . did not constitute an unconditional demand in the sense that it was not subject to further negotiations."

That is even more clearly true where, like Paceco, the party making the negotiable offer is doing work on the contract at the time he makes it. See *Hoggson Bros. v. First Nat. Bank of Roswell,* 231 Fed. 869, 872-73 (8th Cir. 1916), *cert. denied,* 241 U.S. 679 (1916) (closely analogous case involving the construction industry and increased costs; appellate court reversed trial court's finding of breach). *Cf. Wilton v. Clarke,* 27 C.A.2d 1 (1938) (willingness to discuss contract shows statement not an anticipatory breach).

3. A refusal not treated as a repudiation by the other party is not an anticipatory breach; MCS did not treat Paceco's "refusal" as such.

The court found that Paceco refused to deliver hoists of the capacity Harza required except upon payment of $85,285.

That $85,285 figure appears only in the letter that Paceco sent MCS on September 26 (Ex. 19), and nowhere else. Accordingly, the "refusal" the court found could not have occurred before September 26.[13]

MCS sent its note cancelling the contract on September 24. Consequently MCS could not in the nature of things have treated the September 26 letter as a refusal (even assuming it could amount to one, which it couldn't), and therefore that letter could not have been an anticipatory breach.

"In order to charge a party with repudiation of a contract it must appear that his refusal to perform was absolute and unequivocal *and it must have been treated and acted upon as such by*" the other party. *Wilton v. Clarke,* 27 C.A.2d 1, 4 (1938) (emphasis added); *California C. P. Growers v.*

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13. Mr. Ramsden, Paceco's president, testified that the September 26 letter was a "confirmation" of a proposal previously made to Mr. Powell, orally. (R.Tr. 160) However, the previous proposal seems to have been the $59,000 "working arrangement" described on pages 2 to 3 of the September 26 letter.

Mr. Ramsden testified the proposal "made verbally and in this letter" was one in which Paceco was to "gamble on somewhere between $15 and $25,000 that we are right," and that "gamble" is part of the $59,000, not the $85,000, offer. See R.Tr. 344-45; Ex. 19, pp. 2-3.

Even if the $85,000 quote had been made at the time of the oral conversation, the finding that Paceco refused to proceed unless paid an extra $85,000 is clearly erroneous, since the $85,000 quote, if made at all, was certainly accompanied by the $59,000 "proposed working arrangement." (See R.Tr. 344-45, 160-61) Anyway, MCS did not treat the oral proposal, whatever it was, as an unequivocal, final repudiation, since when it was made it "requested that we [Paceco] offer some mutually satisfactory arrangement wherein manufacture of the hoist capacities could be started immediately." (Ex. 19, p. 2)

Harris, 91 Cal.App. 654, 656 (1928); *Cook v. Nordstrand,* 83 C.A.2d 188, 195 (1948):

> ". . . It is clear that appellants' conduct indicated that they regarded the escrow as material and that they did not treat the oral statement of defendant as an absolute refusal to perform. 'The refusal to perform must be treated and acted on as a distinct and unequivocal absolute refusal to perform the promise.' " p. 195

See also *Campos v. Olson,* 241 F.2d 661 (9th Cir. 1957), which held that a letter written by an alleged repudiator could not have constituted an anticipatory breach because the other party did not see it until litigation arose; and *Bauer's Law & Collection Co. v. Harrell,* 32 Cal.App. 45, 56 (1916), which held that an uncommunicated "repudiation" was not an anticipatory breach, "whatever . . . [the alleged repudiator's] state of mind."

Since the court's findings with respect to anticipatory breach (Findings 23 and 24, C.Tr. 192) are based upon the September 26 letter, they must fall. But they would have to fall, anyway, even had they been based upon any prior communication (and even assuming any such communication was unequivocal enough to constitute an anticipatory breach, which none was), because MCS did not treat any prior communication as an absolute refusal, either.

The September 8 letter (Ex. I) The Paceco letter which immediately proceeded the September 24 letter was written on September 8. (Ex. I) But, four days later, on September 12, MCS asked "that we [Paceco] offer some mutually satisfactory arrangement whereby manufacture of the [new] hoist capacities could be started immediately." (Ex. 19; see p. 11, above)

One does not treat a "refusal" as a repudiation of a contract while, after receiving it, he asks the other party to work up a plan to perform that same contract. See *Hanson*

v. Slaven, 98 Cal. 377 (1893); *Wilton v. Clarke,* 27 C.A.2d (1938); *Atkinson v. District Bond Co.,* 5 C.A.2d 738 (1935). Indeed, in *Dingley v. Oler,* 117 U.S. 490 (1886), the Supreme Court held that a party had not treated a communication as a repudiation where, after receiving it, he told the alleged repudiator that he hoped "you will take a more favorable view upon further reflection. . . ."

The June 4 letter The Paceco letter which immediately preceded the September 8 letter was written on June 4. (Ex. AJ) MCS did not treat that letter as a repudiation either, both because its answer to the later September 8 letter showed it did not, and because after it received that June 4 letter it continued to work on calculations and sent them to Paceco to be worked upon by it. One does not treat a refusal as a repudiation, when, after receiving it, he takes steps, and gets the other party to take steps, toward performance under the contract. See *Cook v. Nordstrand,* above, 83 C.A.2d 188 (1948).

In any event, there is no evidence that plaintiff did treat any communication from Paceco as an absolute and unequivocal repudiation. That alone is fatal to MCS. *Cf. Campos v. Olson,* 241 F.2d 661, 663 (9th Cir. 1957) (finding no anticipatory breach in part because there was no evidence as to repudiator's "reaction to the statement [of refusal]").

4. MCS' cancellation was precipitous and uncalled for.

One reason for the rule requiring a repudiation to be absolute and unequivocal is that the party to whom a not wholly absolute and unequivocal repudiation is made may easily find out what it was meant to be, and squeeze any equivocation out of it; for all he need do is ask. Therefore

hat is what he ought to do. See *Frank Bowman Co. v. Lecato,* 292 Fed. 73, 78 (4th Cir. 1923):

> "[G]ood faith calls at the very least for a request for correction with notice that if the correction were not made the contract would be rescinded."

Accord, *New England Oil Corp. v. Island Oil Marketing Corp.,* 288 Fed. 961, 966 (4th Cir. 1923), *cert. denied,* 263 U.S. 702 (1923).

That reason is particularly applicable to this case, because Paceco had told MCS that it was "extremely anxious to cooperate" about the matter, and because, since the parties were in frequent contact (see pp. 8-12, above), MCS could have asked Paceco what its intentions were with no trouble at all.

Furthermore, the hoist capacities had not been finally set until late September, when MCS cancelled. Obviously no one could build the hoists until those capacities were established. (See pp. 10-12, above) That being so, MCS had no need to rush to a conclusion as to what Paceco intended to do, and that is all the more reason why good faith required it to ask Paceco what its intentions were.

But there is more. MCS failed to tell Paceco what the final hoist capacities which had been established were, although those final capacities were less than those which had been the subject of dispute, and although Paceco had asked MCS on September 8 "to hear from you very soon regarding the final hoist capacities established as we are unable to proceed . . ." until they are. (Ex. I; see pp. 10-12, above)

Add to that that Paceco had been telling MCS for a good year that it could not perform without at least having MCS' and Pacific's calculations to work upon, and everyone, including MCS, agreed that that was so; MCS had honored Paceco's request for those calculations all that time and

had asked Paceco to work on them; and all those calculations that MCS sent Paceco all that time were simply academic, because none was final. (pp. 7, 12, above)

MCS did give those final hoist capacities to a third party, to whom it also gave a contract to build the reduced capacity hoists. (Exs. 42, 43) Its failure to give Paceco the same information underlines its failure to act in good faith, but it also kills its case as a matter of simple logic. For how can one anticipatorily breach a promise to provide hoists having a capacity which he has never so much as heard about?

MCS cancelled the contract precipitously and without warning. Then it rushed off to have someone else do the work. It had no reason for acting that way. It should not be rewarded for it. See *McCloskey & Co. v. Minweld Steel Co.,* 220 F.2d 101, 104 (3d Cir. 1955).

Segan Construction Corp. v. Nor-West Builders, 274 F.Supp. 691 (D. Conn. 1967), which was decided a few months ago, is squarely in point. Plaintiff carpenter and defendant contractor had a dispute about what defendant owed plaintiff for services plaintiff claimed to be extras. Plaintiff stopped work while the dispute was going on and submitted his bill for work to date, including compensation for the disputed extras. Without warning, the contractor cancelled the contract and engaged someone else to finish the job. The court held that the contractor had no right to do that, because the carpenter's submittal of the bill along with his stopping work "did not constitute breach of the contract by absolute and unequivocal abandonment." As to the contractor's having treated the carpenter's actions as an anticipatory breach, the court said this:

> ". . . [His] conclusion [that the carpenter had repudiated] was premature, reached without attempted negotiation, discussion or investigation." *Id.,* at 697.

The same is true of what MCS did in this case, and MCS' action ought to meet with the same end.

CONCLUSION

The trial court's judgment should be reversed for the reasons set forth in this brief.

Dated: March 15, 1968.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: March 15, 1968.

Norman B. Richards

(Appendix Follows)

Appendix

Table of Exhibits Referred to in Brief

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